

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANTHONY CHARLES
HICKONBOTTOM,

Petitioner,

v.

JANE PARNELL,

Respondent.

Case No. C10-5030RBL/JRC

REPORT AND
RECOMMENDATION

January 28, 2011

This habeas corpus action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(A) and (B) and Local Magistrate Judge's Rules MJR 3 and MJR 4.

The petition was signed one day after the one year statute of limitations had run. The petition is time barred and the court recommends the petition be dismissed.

Petitioner is seeking federal habeas relief, pursuant to 28 U.S.C. § 2254, from a state conviction out of the Pierce County Superior Court for one count of possession of cocaine with

1 intent to deliver (ECF No. 6). Petitioner pled guilty (ECF No. 13, Exhibit 1). He was sentenced
2 on May 2, 2008, to sixty months and one day (ECF No. 6).

3 Respondent did not answer the petition on the merits and instead moves to dismiss the
4 petition as time barred (ECF No. 13). Petitioner's response to the motion was of no help to the
5 court (ECF No. 15). Because the petition was time barred by one day, and respondent had not
6 addressed whether there are any justified reasons for the delay, the court ordered additional
7 briefing (ECF No. 16).

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9 The additional briefing has been considered and the court concludes that this action is
10 time barred pursuant to 28 U.S.C. 2244 (d) (1) (A), because petitioner waived his right to appeal
11 his sentence when he pled guilty.

12 PROCEDURAL HISTORY

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14 Petitioner pled guilty to possession of a controlled substance with intent to deliver (ECF
15 No. 13, Exhibit 1). He was sentenced on May 2, 2008. In Washington state, when a person
16 enters a guilty plea he waives the right to file an appeal. Washington v. Smith, 134 Wn. 2d 849,
17 953 P.2d 810 (1998). The one-year federal statute of limitations began to run on May 3, 2008.
18 See 28 U.S.C. 2244 (d) (1) (A). Petitioner filed a personal restraint petition in the Washington
19 Court of Appeals on March 12, 2009, stopping the running of the one-year time limit (Dkt. # 13,
20 Exhibit 2). 314 days had elapsed when the personal restraint petition was filed. The Washington
21 Court of Appeals dismissed the petition on July 8, 2009 (Dkt. # 13, Exhibit 5). The statute of
22 limitation did not begin to run because petitioner filed for discretionary review with the
23 Washington State Supreme Court (Dkt. # 13, Exhibit 6).

24
25 The Washington State Supreme Court denied review on November 12, 2009 (Dkt. # 13,
26 Exhibit 7). The remaining 51 days of the one-year time framed began to run on November 13,

1 2009. The time for filing a federal habeas corpus action expired on January 2, 2010. Petitioner
 2 signed his petition on January 3, 2010. The petition was received by the court on January 6, 2010
 3 (Dkt. # 1 and 6).

4 **EVIDENTIARY HEARING NOT REQUIRED**

5 If a habeas applicant has failed to develop the factual basis for a claim in state court, an
 6 evidentiary hearing in this court shall not be held unless the applicant shows that: (A) the claim
 7 relies on (1) a new rule of constitutional law, made retroactive to cases on collateral review by
 8 the Supreme Court that was previously unavailable, or if there is (2) a factual predicate that
 9 could not have been previously discovered through the exercise of due diligence; and (B) the
 10 facts underlying the claim would be sufficient to establish by clear and convincing evidence that
 11 but for constitutional error, no reasonable fact finder would have found the applicant guilty of the
 12 underlying offense. 28 U.S.C. §2254(e)(2) (1996).
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15 Petitioner's claims rely on established rules of constitutional law. Further, petitioner has
 16 not set forth any factual basis for his claims that could not have been previously discovered by
 17 due diligence. Finally, the facts underlying petitioner's claims are insufficient to establish that no
 18 rational fact finder would have found him guilty of the crime. Therefore, this court concludes
 19 that there is no reason to conduct an evidentiary hearing.
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21 **DISCUSSION**

22 There is a one-year statute of limitations on habeas corpus petitions. This time limit was
 23 part of the 1996 amendments to 28 U.S.C. § 2244(d), which were signed into law April 24, 1996.
 24 28 U.S.C. § 2244(d) provides as follows:

- 25 (1) A 1-year period of limitation shall apply to an application for a writ of
 26 habeas corpus by a person in custody pursuant to the judgment of a
 State court. The limitation period shall run from the latest of-

- (A) the date on which the judgment became final by conclusion

1 of direct review or the expiration of the time for seeking
2 such review;

3 (B) the date on which the impediment to filing an application
4 created by State action in violation of the constitution or
5 laws of the United States is removed, if the applicant was
6 prevented from filing by such State action;

7 (C) the date on which the factual predicate of the claim or
8 claims presented could have been discovered through the
9 exercise of due diligence.

10 (2) The time during which a properly filed application for State post-
11 conviction or other collateral review with respect to the pertinent
12 judgment or claim is pending shall not be counted toward any period
13 of limitation under this subsection.

14 28 U.S.C. § 2244 (d).

15 Here, petitioner pled guilty and waived his right to file a direct appeal. (Responsive
16 Briefing ECF No. 17, page 2). The judgment became final when entered on May 2, 2008, and
17 May 3, 2008, was day one on the one-year statute of limitations. The statute ran uninterrupted
18 until March 12, 2009, when petitioner filed his personal restraint petition. Three hundred and
19 fourteen days of the three hundred and sixty five day time frame had elapsed. The statute began
20 to run the day after the Washington Supreme Court concluded review of the motion for
21 discretionary review. Thus, November 13, 2009 was day three hundred and fifteen. January 2,
22 2010 was day three hundred and sixty five and the last day petitioner had to file a habeas corpus
23 petition. The petition is dated January 3, 2010 and is time bared. This court recommends that
24 the petition be DISMISSED WITH PREJUDICE as time barred.

25 CERTIFICATE OF APPEALABILITY

26 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district
court's dismissal of his federal habeas petition only after obtaining a certificate of appealability
(COA) from a district or circuit judge. A certificate of appealability may issue only where a
petitioner has made "a substantial showing of the denial of a constitutional right." See 28 U.S.C.

1 § 2253(c)(3). A petitioner satisfies this standard “by demonstrating that jurists of reason could
2 disagree with the district court’s resolution of his constitutional claims or that jurists could
3 conclude the issues presented are adequate to deserve encouragement to proceed further.”
4 Miller-El v. Cockrell, 537 U.S. 322, 327 (2003). Under this standard, this Court concludes that
5 petitioner is not entitled to a certificate of appealability with respect to this petition.
6

7 CONCLUSION

8 This petition should be DISMISSED WITH PREJUDICE. Pursuant to 28 U.S.C. §
9 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this
10 Report to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in
11 a waiver of de novo review by the District Court Judge. See 28 U.S.C. 636 (b)(1)(C).
12 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for
13 consideration on **January 28, 2011**, as noted in the caption.
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15 DATED this 3rd day of January, 2011.

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18 J. Richard Creatura
19 United States Magistrate Judge
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